**IN THE SUPREME COURT OF MISSISSIPPI**
**No. 2015-FC-01317-SCT**

ROBERT SWINDOL — APPELLANT

v.

AURORA FLIGHT SCIENCES CORPORATION — APPELLEE

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ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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# PROPOSED AMICUS CURIAE BRIEF OF THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF APPELLANT

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Exhibit A

## INTEREST OF AMICUS CURIAE

The National Rifle Association of America, Inc. ("NRA") is America's foremost and oldest defender of the fundamental right to keep and bear arms. Founded in 1871, the NRA has approximately five million members and is America's leading provider of firearms marksmanship and safety training for civilians. The NRA has a vital interest in the outcome of this proceeding. Mississippi law provides that a "private employer may not establish, maintain, or enforce any policy or rule that has the effect of prohibiting a person from transporting or storing a firearm in a locked vehicle in any parking lot, parking garage, or other designated parking area." MISS. CODE § 45-9-55(1). But the defendant in this case—Aurora Flight Sciences Corporation—insists that employers are free to violate the plain terms of this unambiguous statutory prohibition with impunity and that the law provides no judicial recourse for law-abiding, responsible employees fired pursuant to a company policy forbidding employees from storing firearms in their locked automobiles parked in the company's lot.

The NRA has tens of thousands of members in Mississippi, and it actively supported the passage of Mississippi's law and others like it. *See, e.g.*, *Governor Barbour Signs Castle Doctrine, Other NRA-Backed Gun Provisions Into Law*, NRA INSTITUTE FOR LEGISLATIVE ACTION, Mar. 29, 2006, https://goo.gl/emdc6i. And it consistently has sought to defend those laws in court. *See Mitchell v. University of Kentucky*, 366 S.W.3d 895, 896–97 (Ky. 2012) (NRA participated as amicus); *Ramsey Winch Inc. v. Henry*, 555 F.3d 1199 (10th Cir. 2009) (same); *Florida Retail Fed'n, Inc. v. Attorney General of Fla.*, 576 F. Supp. 2d 1301, 1302 (N.D. Fla. 2008) (NRA intervened as defendant). The NRA seeks to do the same here.

A ruling in Aurora's favor would vitiate the rights of NRA members and the other law-abiding citizens of this State and negate the efforts of the Mississippi Legislature to protect those

rights. What is more, the effects of such a ruling could extend beyond Mississippi, as courts in other states may look to any ruling by this Court as persuasive authority. In recent years, the legislatures of more than 20 states have taken steps to protect the right of employees to keep firearms in locked vehicles parked in employer parking lots. *See* Ethan T. Stowell, *Note: Top Gun: The Second Amendment, Self-Defense, and Private Property Exclusion*, 26 REGENT U. L. REV. 521, 522 n.9 (2013–14); *see also* ALA. CODE § 13A-11-90; IDAHO CODE § 5-341; MO. ANN. STAT. § 571.030(6); NEB. REV. STAT. § 69-2441(3); OHIO REV. CODE § 2923.126(C)(2)(a); TENN. CODE §§ 39-17-1313, 50-1-312; WIS. STAT. § 175.60(15m). While some of those laws have express provisions addressing remedies, many, like Mississippi's, do not. It is imperative that the courts not effectively repeal these laws by refusing to enforce them against law-breaking employers.

The interests at stake are not abstract. From 2004 to 2008, for example, over 400,000 non-fatal violent crimes were perpetrated in parking lots and garages nationwide. *See* Bureau of Justice Statistics, *Location*, OFFICE OF JUSTICE PROGRAMS, http://goo.gl/vPRqug. And in 2008 alone, approximately 178,000 non-fatal violent crimes were perpetrated upon victims on the way to or from work. *See* BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2008 STATISTICAL TABLES, tbl. 64 (Mar. 2010). These numbers likely would have been even higher were it not for the defensive use of firearms. The leading study found "that each year in the U.S. there are about 2.2 to 2.5 million [defensive gun uses] of all types by civilians against humans," and the data indicate that 4.5% of these incidents—about 100,000 a year—take place in parking lots or commercial garages. *See* Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 164, 185 tbl. 3 (1995). Furthermore, Mississippi enacted the law at issue here in 2006. From 2003 to 2005, there were an average of 12 occupational shooting homicides a year in the State; from 2007

to 2010 that average dropped to 6. *See* Bureau of Labor Statistics, *State Occupational Injuries, Illnesses, and Fatalities*, UNITED STATES DEPARTMENT OF LABOR, http://goo.gl/aE3hqB (click on links for each year to see annual data).

## ARGUMENT

The federal district court erred in its interpretation of Mississippi law in this case. The question before the Court is "[w]hether in Mississippi an employer may be liable for a wrongful discharge of an employee for storing a firearm in a locked vehicle on company property in a manner that is consistent with Section 45-9-55." Certification Order at 9 (Aug. 28, 2015). This Court should answer that question in the affirmative.

Employers in Mississippi generally "may not establish, maintain, or enforce any policy or rule that has the effect of prohibiting a person from transporting or storing a firearm in a locked vehicle in any parking lot, parking garage, or other designated parking area." MISS. CODE § 45-9-55(1). Mr. Swindol's complaint alleges that Aurora violated this statutory prohibition in every way possible: it *established* and *maintained* a "company policy forbidding firearms on company property," and it *enforced* that policy by "fir[ing] Swindol . . . for violating" it. Certification Order at 5. These allegations must be accepted as true. *See Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993).

Aurora nonetheless claims, incredibly, that "there is no allegation that Aurora engaged in any illegal conduct." Aurora 5th Cir. Br. at 18. But violating § 45-9-55 likely is a *criminal offense*. Under Mississippi law, "[o]ffenses for which a penalty is not provided elsewhere by statute . . . shall be punished by fine of not more than one thousand dollars ($1,000.00) and imprisonment in the county jail not more than six (6) months." MISS. CODE § 99-19-31. The Attorney General has concluded that a person who violates another employment-related statute—one providing that "[i]t

shall be unlawful for any county prisoner or prisoners to be leased or hired to any individual or corporation for any purpose whatsoever"—"may be punished pursuant to Section 99-19-31." Re: Working of County Prisoners, Office of the Attorney General, Opinion No. 2000-0142, 2000 WL 530441 (Mar. 17, 2000). And Oklahoma's courts, on the basis of a similar general punishment statute, have concluded that it is a crime to violate that State's ban on prohibiting employees from storing firearms in their vehicles. *See Whirlpool Corp. v. Henry*, 2005 OK CR 7, ¶ 7, 110 P.3d 83, 85. At any rate, regardless of whether Aurora's alleged conduct was *criminal*, it plainly was *illegal*.

Yet Aurora claims that the employment-at-will doctrine shields it from liability for the illegal act of firing Mr. Swindol in violation of § 45-9-55. This is not so. While the "common law rule" is "that the employment contract at will may be terminated by either party with or without justification," *McArn v. Allied Bruce-Terminix Co., Inc.*, 626 So.2d 603, 604 (Miss. 1993), the Legislature exercised its unquestioned "authority to enact a statute that abrogates the common law rule" when it enacted § 45-9-55, *see Maranatha Faith Ctr., Inc. v. Colonial Trust Co.*, 904 So.2d 1004, 1007 (Miss. 2004); *see also Pickering v. Langston Law Firm, P.A.*, 88 So.3d 1269, 1279 (Miss. 2012). The common-law rule is that, "absent an employment contract expressly providing to the contrary, an employee may be discharged at the employer's will for good reason, bad reason, or no reason at all, *excepting only reasons independently declared legally impermissible*." *McArn*, 626 So.2d at 606 (emphasis added). And the Legislature has exercised its indisputable power to declare it legally impermissible for an employer to discharge an employee by "enforc[ing] any policy or rule that has the effect of prohibiting a person from transporting or storing a firearm in a locked vehicle in any parking lot, parking garage, or other designated parking area." MISS. CODE

§ 45-9-55(1). Because the Legislature has abrogated the common-law rule, that rule can provide no defense to Aurora's liability for the firing of Mr. Swindol.

In light of the foregoing, it matters not at all whether this Court would craft an exception to the common-law employment-at-will doctrine; the Legislature already has done so. But if it were a matter for the Court, the Court should recognize an exception for terminations that violate § 45-9-55. In *McArn*, this Court followed through on its "warn[ing]" to "employers that [it would] be looking for a wiser and more humane alternative to the terminable at will rule in an employment contract," *Bobbitt v. Orchard, Ltd.*, 603 So.2d 356, 361 (Miss. 1992), by recognizing "a narrow public policy exception," *McArn*, 626 So.2d at 607. While this case does not fit into the circumstances specifically identified in *McArn*—refusing to participate in illegal conduct and reporting illegal conduct—this Court expressly stated that the public-policy exception would apply "in *at least*" those "two circumstances," indicating that the exception potentially may apply in *other* circumstances. *Id.* (emphasis added). And if it is to apply in *any* other circumstances, it surely should apply here: where the termination *itself* is plainly unlawful, and the employee would otherwise be without a remedy at law for the violation. (Whether the remedy is described as a tort for wrongful discharge, an implied statutory right of action, or in some other manner is unimportant; what is important is that the discharged employee not be left without a remedy for an employer's unlawful actions.) Indeed, the words of one federal district court's "prophetic *Erie*-guess" anticipating *McArn*, *DeCarlo v. Bonus Stores, Inc.*, 989 So.2d 351, 355 (Miss. 2008), apply equally to this case: "If we are to have law, those who so act against the public interest must be held accountable for the harm inflicted thereby; to accord them civil immunity would incongruously reward their lawlessness at the unjust expense of their innocent victims." *Laws v. Aetna Fin. Co.*, 667 F. Supp. 342, 348 (N.D. Miss. 1987).

This Court's post-*McArn* decisions provide further support for an exception to the employment-at-will doctrine here. In *Buchanan v. Ameristar Casino Vicksburg, Inc.*, 852 So.2d 25 (Miss. 2003), for example, this Court declined to revisit its decision in *Kelly v. Mississippi Valley Gas Co.*, 397 So.2d 874 (Miss. 1981), which refused to recognize an exception for "an employee who may have been discharged for filing a workers' compensation claim," *Buchanan*, 852 So.2d at 26. But the *reason* the *Kelly* Court did not recognize such an exception was that the Legislature had *not* prohibited employers from firing employees for filing workers' compensation claims: "Our Workmen's Compensation Law," this Court reasoned, "does not contain a provision for retaliatory discharges, nor does it contain a provision making it a crime for an employer to discharge an employee for filing a claim." *Kelly*, 397 So.2d at 876. That distinguished Mississippi from states that had recognized an exception: "the statutes in [those] states *contain sanctions against discharging employees for filing claims for workmen's compensation benefits.*" *Id.* at 875 (emphasis added). So too here: the Mississippi Legislature expressly has prohibited employers from firing employees for storing firearms in their parked vehicles.

*Willard v. Paracelsus Health Care Corp.*, 681 So.2d 539 (Miss. 1996), likewise supports an exception in this case. In *Willard*, this Court held that a plaintiff may pursue punitive damages when asserting a wrongful discharge claim under *McArn*. *Id.* at 542. In reaching this decision, this Court cited with approval a decision from Maryland, *Moniodis v. Cook*, 494 A.2d 212 (Md. Ct. Spec. App. 1985), which held that punitive damages were appropriate in a case just like this one—i.e., where the firing was proscribed by statutory law. As this Court explained, in *Moniodis*, "an employer terminated an employee for refusing to take a polygraph test," but "*[a] Maryland law prohibited the requirement of a polygraph test as a condition to employment.* The court held that the employer acted with malice, because it knew of the law, and so ruled that punitive damages

were appropriate." *Willard*, 681 So.2d at 542 (emphasis added). Given this Court's reliance on *Moniodis* to hold that punitive damages are available for the at-will exceptions this Court already has recognized, it follows a fortiorari that this Court should recognize an additional exception for the situation presented here. Indeed, as the Maryland court recognized, the case for an exception from the common-law at-will doctrine is *stronger* for statutory rights than for the exceptions already recognized by this Court: "other courts have recognized wrongful discharge actions where the discharge . . . was in retaliation for the employee's refusal to participate in an illegal scheme. *The statute here is more explicit, condemning the very conduct upon which the appellees' cause of action is based.*" *Moniodis*, 494 A.2d at 216–17 (emphasis added) (citation omitted). The same, of course, is true here.

To the extent any uncertainty remains, this Court should look to the Kentucky Supreme Court's decision in *Mitchell*, which held that Kentucky statutes protecting the right of individuals to keep firearms in their vehicles supported a cause of action for wrongful termination in violation of public policy. While there are differences between *Mitchell* and this case—the Kentucky statutes expressly conferred a civil cause of action, and Kentucky's public-policy exception arguably is broader than this State's, *see Mitchell*, 366 S.W.3d at 898, 902—the key point here is that the legislature of Kentucky, like the Legislature of this State, had "expressed a strong public policy in favor of exempting a person's vehicle from restrictions on the possession of deadly weapons," *id.* at 901. This Court should follow the Kentucky Court in not allowing employers to violate the Legislature's unambiguous policy prescriptions with impunity.

A final point remains to be addressed: Aurora's argument that the Legislature has *shielded* it from civil liability for violating the statute. The Legislature did no such thing. The statute states that "[a] public or private employer shall not be liable in a civil action for damages resulting from

or arising out of an occurrence involving the transportation, storage, possession or use of a firearm covered by this section." MISS. CODE § 45-9-55(5). This language shields an employer from any liability that could arise from *obeying* the Legislature's command and *allowing* employees to store firearms in their locked vehicles; it does not immunize employers for *violating* the statute. Indeed, the firing of an employee in *violation* of the law is not an "occurrence" involving the activity "covered" by the law. Accordingly, the title of the bill before the Legislature stated that the law would "Specify Certain Immunity for Employers *with Respect to the Transportation or Storage of a Firearm on Employer's Property*." 2006 Miss. Laws ch. 450 (H.B. 1141) (emphasis added). And the Chairman of the Senate Judiciary A Committee explained that a "company should not be held liable *for the worker's actions*." *Bill on Work Shootings in Gov.'s Corner*, CLARION-LEDGER (JACKSON, MISS.), Mar. 18, 2006, at A1 (emphasis added).

Laws like Mississippi's often "specifically protect the property owner from liability for any related injuries or damages." *Parking Lot Gun Laws and the Right to Transport Firearms* Feb. 15, 2006, NRA INSTITUTE FOR LEGISLATIVE ACTION, https://goo.gl/sFZLj6. *See, e.g.*, ALASKA STAT. § 18.65.800(c); FLA. STAT. § 790.251(5)(b); ME. REV. STAT. tit. 26, § 600(2); N.D. CENT. CODE § 62.1-02-13(3); OKLA. STAT. tit. 21, § 1289.7a(B); TENN. CODE § 39-17-1313(b). In this way, such laws seek to balance the rights of employees with the rights of employers, by protecting the right of employees to bear arms while immunizing employers from liability for employees' actions in exercising that right. Misconstruing the law to shield employers from any consequences for their own *violations* of the law would upset this balance and leave employers free to trample employees' rights with impunity.

## CONCLUSION

For these reasons, this Court should answer "yes" to the certified question.

Dated this the ___ day of September, 2015.

Respectfully submitted,

*National Rifle Association of America, Inc.*

By: *s/Michael B. Wallace*

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**CERTIFICATE OF SERVICE**

I, the undersigned counsel, do hereby certify that I have this day electronically filed the foregoing with the Clerk of the Court using the MEC system, which sent notification of such filing to the following:

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This the _____ day of September, 2015.

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